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No. 85-1142 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

MANUFACTURERS HANOVER TRUST COMPANY,
AS EXECUTOR OF ESTATE OF CHARLOTTE C. WALLACE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Commissioner's former practice of using gender-based mortality tables to value reversionary interests of a decedent's estate for purposes of Section 2037 of the Internal Revenue Code violated the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 775 F. 2d 459. The opinion of the district court (Pet. App. A38-A49) is reported at 576 F. Supp. 837.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1985 (Pet. App. A50-A51), and rehearing was denied on October 22, 1985 (Pet. App. A52). The petition for a writ of certiorari was filed on January 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 5, 1923, Charlotte C. Wallace established a trust that provided income to her for her life and, on her

death, income to her son Howard. The corpus of the trust was to pass by the terms of Howard's will if he outlived his mother, but by the terms of Charlotte's will if he predeceased her. Charlotte died on February 28, 1976, at the age of 88; she was survived by Howard, who was then 57 years old. Pet. App. A3.

Section 2037 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that property in which a decedent has retained a reversionary interest must be included in the gross estate if the value of the reversionary interest immediately before the death of the decedent exceeds 5% of the value of the property. Section 2037(b) provides that "[t]he value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary."

Treasury regulations in effect at the time of Charlotte's death required the value of a reversionary interest to be computed according to gender-based mortality tables. Treas. Reg. §§ 20.2031-10(d), (e) and (f), 20.2037-1(c)(3). Petitioner (the executor of Charlotte's estate), however, calculated the value of the decedent's reversionary interest using Unisex Table 1 of the *United States Life Tables: 1959-1961*, published by the then Department of Health, Education, and Welfare, and determined the value to be 4.9867%. Because that value fell below the statutory 5% cutoff, petitioner paid no federal estate tax on the trust corpus. 1 Public Health Service, U.S. Dep't of Health, Education, and Welfare, *Vital Statistics of the United States: 1964*, at 3 (1966); Pet. App. A4.

The Commissioner determined that the trust corpus should be included in Charlotte's gross estate because, using the gender-based tables in the regulations, the value of

Charlotte's reversionary interest was 6.654%. Petitioner paid the resulting $458,662.18 estate tax deficiency and, following the denial of an administrative claim for refund, brought this refund action in the district court, contending that the Commissioner's use of gender-based mortality tables violated the equal protection component of the Fifth Amendment. Pet. App. A4, A49.

The district court agreed with petitioner's contention that the challenged practice was unconstitutional (Pet. App. A38-A49). The court assumed that the government's objective in using the tables—achievement of an accurate forecast of life expectancy for purposes of valuing reversionary interests under Section 2037—was an important one, but concluded that "the sex-based classifications do not have the requisite direct and substantial relationship" to that objective (*id.* at A45). On that ground, the court declared the tables invalid (*ibid.*). Because the use of unisex mortality tables would result in exclusion of the corpus of the trust from Charlotte's gross estate, the court awarded petitioner the claimed refund (*id.* at A47).

The court of appeals, in a split decision, reversed (Pet. App. A1-A37). The court concluded that the use of gender-based mortality tables to value reversionary interests for purposes of Section 2037 constituted discrimination based on gender (Pet. App. A5-A10), but held that the gender classification was constitutional because it was substantially related to the important governmental objective of promoting equity and fairness in estate taxation by accurately valuing reversionary interests (Pet. App. A10-A21). The court observed that the challenged practice distributed comparative benefits as well as comparative burdens to both men and women (*id.* at A13-A16), and that the gender classification did not demean women or men and was not based on stereotyped assumptions about social roles (*id.* at

A16). Finally, the court concluded that Section 2037 legitimately focused on average life expectancies, and that "the increased accuracy of gender-based tables constitutionally justifies their use" in this context (Pet. App. A21).

ARGUMENT

The decision below is correct and, contrary to petitioner's contention, is not inconsistent with any decision of this Court. There is no claim, or basis for a claim, of a conflict in the circuits on the question presented. The Treasury, moreover, has adopted the use of gender-neutral mortality tables for estate tax purposes for decedents dying after November 30, 1983,[1] and the issue presented therefore lacks continuing importance.

1. Determining the value of a decedent's reversionary interest in property for purposes of Section 2037 of the Internal Code requires calculating the probability (just prior to death) that the decedent would outlive the beneficiary.[2] The Treasury regulations in effect at the time of Charlotte's death used gender-based mortality tables to

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[1]T.D. 7955, 1984-1 C.B. 40, *reprinted in* 49 Fed. Reg. 19973 (1984).

[2]When the federal estate tax was first enacted in 1916, all property subject to a transfer "intended to take effect in possession or enjoyment at or after [the transferor's] death" was includible in the transferor's gross estate. Revenue Act, 1916, ch. 463, § 202(b), 39 Stat. 777-778. In *Helvering* v. *Hallock*, 309 U.S. 106, 112 (1940), the Court held that a transfer of property subject to a reversionary interest that expired upon the transferor's death was a part of the gross estate. This rule was taken to its extreme in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949), in which a $1,140,000 trust was included in the settlor's gross estate even though the value of the settlor's reversionary interest was approximately $70. In response, Congress enacted the predecessor of Section 2037. The policy of taxing transfers subject to a reversionary interest was preserved, but where the value of the reversionary interest fell below 5% of the trust, the decedent's interest was considered to be insignificant, and the trust was not includible in the gross estate. See H.R. Conf. Rep. 1412, 81st Cong., 1st Sess. 6-7 (1949); S. Rep. 831, 81st Cong., 1st Sess. 8 (1949).

determine the life expectancy of decedents and beneficiaries. Treas. Reg. § 20.2031-10(d), (e) and (f). As the court of appeals observed (Pet. App. A6-A7), the use of gender-based tables, rather than gender-neutral tables, affects the calculation of the value of a reversionary interest in two ways. First, where the decedent is female, the value of the reversionary interest will be greater than it would be were the decedent a similarly situated male[3] because the female decedent would have been more likely to outlive the beneficiary than would a male decedent. Second, regardless of the sex of the decedent, if the beneficiary is female the value of the reversionary interest will be less than it would be if the beneficiary were male, because a female beneficiary would have been more likely to outlive the decedent than would a similarly situated male beneficiary (*id.* at A6-A7).[4]

Because the Commissioner's use of gender-based tables treated similarly situated men and women differently in a way that could affect the amount of the estate tax, the court of appeals concluded that the practice "constitutes discrimination based on gender" (Pet. App. A8). The court correctly held, however, that the challenged practice did not violate the equal protection component of the Fifth Amendment (*id.* at A10-A21).

In determining that the gender classification in issue was constitutional, the court below applied the standard articulated in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), that "classification by gender must serve important governmental objectives and must be substantially related to

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[3] *I.e.*, a male of the same age with a beneficiary of the same age and gender.

[4] Of course, it is only when the value of the reversionary interest was close to 5% that these differences would have had a significant practical effect.

achievement of those objectives."[5] The court observed that the gender-based tables were adopted in 1970 in the interest of greater actuarial accuracy, and correctly held that such accuracy is an important government objective (Pet. App. A11-A13). Since the accurate valuation of reversionary interests promotes equity and fairness in estate taxation (*id.* at A3, A12), there can be no doubt that a material increase in that accuracy substantially serves an important objective.

There is no mechanical test for determining whether a gender-based classification satisfies the substantial relationship standard. This Court has, however, consistently struck down gender-based classifications "which demean the ability or social status of the affected class" (*Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion)), or are based on stereotyped or traditional assumptions "about the proper roles of men and women" (*Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 726 (1982) (footnote

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[5]Petitioner erroneously asserts (Pet. 9, 20) that the court of appeals failed to apply this Court's cases requiring that the government show an " 'exceedingly persuasive justification' " for a gender-based classification. In *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982) (citation omitted), on which petitioner relies (Pet. 20), the Court stated that this burden is met "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives' " (458 U.S. at 724, quoting *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980)). The court of appeals applied that standard here (Pet. App. A3, A10).

The court of appeals rejected the government's argument that the "rational basis" standard provides the appropriate level of scrutiny in evaluating a challenge to a gender-based tax classification (Pet. App. A10-A11). See, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983) ("[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). Cf. *Kahn* v. *Shevin*, 416 U.S. 351, 355-356 (1974). Since the provision in issue here passes constitutional muster under the heightened scrutiny of the *Craig* v. *Boren*, *supra*, standard, however, there is no need in this case to decide whether a lower level of scrutiny would be appropriate.

omitted)). Conversely, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion); see also *Rostker* v. *Goldberg*, 453 U.S. 57, 79 (1981). The classification in issue here plainly falls into the latter category. Gender-based mortality tables are not based on demeaning generalizations or stereotyped assumptions (Pet. App. A16). Rather, they reflect a real sex mortality differential.[6]

Moreover, as the court of appeals noted, "[w]hen discrimination on the basis of gender has been found to violate the constitution, it has always been the case that the directly affected women (or men) as a class were disadvantaged" (Pet. App. A14). Here, by contrast, the use of gender-based tables for purposes of Section 2037 "distributes comparative benefits to both men and women, and distributes comparative burdens to both men and women" (Pet. App. A21). This is because beneficiaries, as well as decedents, are directly affected by the use of those tables. Since a beneficiary's life expectancy is taken into account under Section 2037, and since the amount of the estate tax has an obvious

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[6]This Court has unanimously recognized that "[a]s a class, women live longer than men." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 704 (1978); *id.* at 724 (Blackmun, J., concurring in part and concurring in judgment); *id.* at 725-727 (Burger, C.J., concurring in part and dissenting in part) (footnotes omitted) ("Gender-based actuarial tables have been in use since at least 1843, and their statistical validity has been repeatedly verified.") See also *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1104 (1983) (Powell, J., dissenting in part and concurring in part) ("Sex-based mortality tables reflect objective actuarial experience."). Indeed, petitioner recognizes (Pet. 14) that "[g]reater longevity for women is * * * a group statistical observation", arguing only that the generalization is "unfair to an individual to whom it does not apply" (*id.* at 11). But see pages 10-11, *infra*.

impact on beneficiaries, the court correctly viewed beneficiaries as being "directly affected" by the challenged classification (Pet. App. A14). Although the challenged classification places a female decedent in a comparatively worse position than a male decedent, gender-based tables benefit female beneficiaries in comparison to men, because the value of the reversionary interest when the beneficiary is female is lower than the value when the beneficiary is a similarly situated male (*id.* at A6-A8, A14-A15). The court of appeals found no evidence that this "patchwork distribution of relative advantages and disadvantages" placed a greater aggregate burden on the class of directly affected women than on the class of directly affected men (*id.* at A15-A16). Although, as the court recognized (*id.* at A16), this unusual distribution of burdens and benefits is not dispositive, it is a factor that further demonstrates that there is nothing invidious about the use of gender-based tables for purposes of Section 2037.[7]

Finally, the use of gender-based mortality tables is substantially related to the particular valuation purpose of Section 2037. In all cases where Section 2037 comes into

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[7]There is no merit to petitioner's assertion (Pet. 16, 19) that the court's examination of the effect of gender-based tables on beneficiaries conflicts with this Court's decision in *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980). There, the Court held invalid a law that provided that workers' compensation death benefits would be paid to a widow regardless of whether she could prove actual dependence on her husband's earnings, but that a widower would receive death benefits only if he proved actual dependence on his wife's earnings or was incapacitated. The distinction was evidently based on assumptions about the traditional roles of men and women. In addition, all directly affected men were burdened by the law in *Wengler* and all directly affected women were benefited; employees (both male and female) were only indirectly affected. By contrast, the provision involved here distributes direct benefits and burdens to both men and women—it directly affects the consequences attendant upon the decedent's choice of whether to retain a reversionary interest, as well as what will be received by the beneficiary.

play, the decedent has in fact predeceased the beneficiary, and the decedent's reversionary interest therefore has no actual value. Section 2037 necessarily requires determination of a *theoretical* value based on the probability, just prior to death, that the decedent would have outlived the beneficiary, and, as the court of appeals observed (Pet. App. A20), Congress determined that use of average life expectancies was a fair way to determine this theoretical value. Since Section 2037 legitimately focuses on averages rather than on individual situations, and "gender-based mortality tables * * * give more accurate averages of life expectancies than do gender-neutral tables" (Pet. App. A21), the gender classification used in the tables is substantially related to the achievement of the important governmental objective of accurate valuation of reversionary interests.[8]

2. There is no merit to petitioner's contention (Pet. 8-9, 10, 12-13) that the decision below conflicts with *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983). Those cases involved the use by employers of gender-based mortality data to provide different pension plan treatment for male and female employees. In *Manhart*, the employer required female employees to make higher monthly pension contributions than male employees. In *Norris*, the pension plan paid

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[8]Although the Treasury has decided to use gender-neutral tables for decedents dying after November 30, 1983, that decision, contrary to petitioner's assertion (Pet. 20-21), does not establish that the prior practice of using gender-based mortality tables served no important governmental objectives. Instead, it simply shows that on reconsideration in light of intervening developments, the agency determined that an alternative approach was preferable (notwithstanding its diminution of actuarial accuracy). This is, of course, a decision for the agency, not the courts.

lower monthly benefits to female employees. Both employers justified their practices by relying on mortality tables showing that, on average, women live longer than men, and that women would therefore receive, on average, pension benefits over a longer period of time after retirement than men. The Court found in both cases that the pension plans discriminated on the basis of sex and therefore, ipso facto, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *Manhart*, 435 U.S. at 708-711; *Norris*, 463 U.S. at 1079-1086.

The effects of the use of gender-based statistics in *Manhart* and *Norris* were quite different from the effects here.[9] In those cases, the different treatment of men and women resulted in discrimination against individual women who did not fit the statistical generalization. See *Manhart*, 435 U.S. at 708; *Norris*, 463 U.S. at 1084-1086.[10] Under the statutory scheme involved here, the decedent's actual life

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[9]Moreover, both cases dealt with the requirements of Title VII, which prohibits all employer classifications based on sex in the absence of a bona fide occupational qualification (42 U.S.C. 2000e-2(a) and (e))—not with the constitutional equal protection requirements, which prohibit only gender-based classifications that are not substantially related to important objectives. Cf. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 133-137 (1976).

[10]Because each individual needs and receives retirement income only so long as he or she is alive to spend it, the employers were required in those cases to provide similarly calculated and funded periodic payments to both men and women for as long as each individual needs the payments. Here, by contrast, the reversionary interest tables principally served to effectuate the statutory decision to ameliorate a perceived inequity in the estate tax laws in order to exclude trusts with insignificant reversionary interests (see note 2, *supra*). In determining which interests would be deemed significant, it was reasonable to rely on average life expectancies, and, in calculating those expectancies, it was more accurate to use tables that included, among other factors, the gender of the parties involved. There is, in this context, no adverse effect on non-conforming individuals similar to that involved in *Norris* and *Manhart*.

expectancy is entirely irrelevant. Section 2037 necessarily focuses on probabilities and averages; the decedent—who, of course, is already dead and thus has no life expectancy—does not fit the statistical norm for average life expectancy whether gender-based or gender-neutral tables are used to determine that theoretical life expectancy. Accordingly, the court of appeals correctly concluded that the use of gender-based tables under Section 2037 "does not present the same kind of danger of unjustified discrimination against individuals as was found in *Manhart*" (Pet. App. A21).

3. Finally, the issue presented lacks prospective importance. In October 1983, the Treasury proposed new regulations that use gender-neutral tables to value reversionary interests for purposes of Section 2037 (48 Fed. Reg. 50087), and these new regulations were adopted in May 1984 (T.D. 7955, 1984-1 C.B. 40, *reprinted in* 49 Fed. Reg. 19973 (1984)). The new gender-neutral tables are applicable to decedents dying after November 30, 1983. See Treas. Reg. § 20.2031-7(a)(1), (d), (e) and (f). The constitutional question presented in this case is therefore one of diminishing importance that does not warrant further review by this Court.[11]

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[11] Although other Treasury regulations continue to use gender-based mortality data for various purposes relating to the income tax treatment of annuities and retirement plans (see Treas. Reg. §§ 1.72-9, 1.401(j)-4(a)(1)(ii), 1.403(b)-1(d)(4)(ii), 1.408-2(b)(6)(iv)), the validity of those regulations is not in issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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